

# Read My Lips

How plaintiffs behave at deposition can foretell how juries will react to their testimony at trial.

by Michael S. Eisenbaum

Some attorneys fight to take money, others fight to keep it. In this constant battle, 95% of the cases that go to trial do so because one side or the other has not accurately evaluated the case.

It is not always about the amount of the plaintiff's medical bills or the type of injury. More often, it's about the nature of the individual who was injured. How well this person connects with a jury will largely determine whether the award of general or noneconomic damages will be at the high end of the spec-

trum or more toward the low end.

Although the caliber of the attorneys representing each side should not be overlooked, with all else being equal, the value of an injury can double or even triple, based on the plaintiff's ability to make a real connection with a jury.

There is no set formula for determining general or noneconomic damages, which are generally considered to be compensation for the injured person's "pain and suffering" as a result of the injury. This includes compensation for both past and future pain and suffering.

Roughly 20 years ago, defense attorneys and insurance companies defending personal injury cases frequently employed a formula of three-to-five-times the reasonable medical expenses when attempting to reach

## Key Points

- ▶ **The Situation:** Personal injury liability cases often go to jury trial because plaintiffs refuse to settle.
- ▶ **The Issue:** Insurers' attorneys can better assess a trial's value by evaluating the plaintiff's demeanor and attitude at deposition.
- ▶ **The Upshot:** Knowing the plaintiff's likely behavior gives insurers a preview of how juries will react to their testimony.

a settlement of a particular case. The theory was that three times the medical expenses allows for one-third to cover medical expenses, one-third to cover attorneys fees and one-third is left over for the plaintiff.

Nowadays, personal injury claims are examined on a case-by-case basis. For relatively minor injury cases, such as soft-tissue injuries to the neck and

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back, the defense typically employs a strategy of offering slightly more than the amount of the medical expenses, knowing that the medical expenses in such cases have a lien against the case, and in the end get sufficiently reduced to allow the case to be settled.

Determining the value of a serious personal injury case is vastly different, and varies depending on its settlement value or its jury-verdict potential. Here we are referring to injuries such as multiple broken bones, traumatic brain injuries, bloody flesh injuries from dog bites and other incidents, or injuries resulting in organ damage. Historical and statistical data based upon the type of injury and amount of medical expenses are useful to establish a baseline range or profile of value. Such elements, in general, are easier to quantify.

The issue is how to quantify that portion of the case that is not readily quantifiable. Thus, one must look beyond the statistical profile and give significant weight to the quality of the plaintiff as a witness.

In general, the settlement value of a case is going to be less than the verdict potential. In either case, the main component in assessing its value is likely to be the amount to consider as general damages. If the nature of the injury and the amount of medical expenses are a constant, how do we determine the value of the injured person's general damages? In such cases, medical experts are employed by both sides to give opinions on the nature and extent of the injury, including the impact of the injury on the person's physical and mental status. Although attorneys should always consider the importance of having qualified experts with courtroom savvy on their side, the ultimate value of a case hinges on the impression of the injured person as a witness.

### What the Jury Sees

In California, the law describes noneconomic damages as including physical pain and mental suffering,

loss of enjoyment of life, physical impairment, disfigurement, inconvenience, grief, anxiety, humiliation and emotional distress. When a jury is instructed on how to calculate noneconomic damages based on this list, they are told: "No fixed standard exists for deciding the amount of these noneconomic damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense." Obviously, this leaves a very wide range of possibilities in an award of damages, with the defense attorney arguing how to minimize the general damages and the plaintiff's attorney crafting arguments to maximize the award.

**The plaintiff, as an individual, is frequently the key factor in determining what a jury will award in general damages.**

Two recent cases that went to trial illustrate the importance of the plaintiff's personality, credibility and demeanor in determining what value to place on the general-damages component of the claim.

In one case, in which the plaintiff was severely beaten by a security guard, the evidence revealed that the plaintiff was struck in the head and face. This evidence included a video of the incident, which had a substantial effect on the jury. The plaintiff sustained a traumatic brain injury, which he and his doctors claimed was permanent. He had not worked for two years since the incident, and even the defense medical and psychological experts acknowledged the injury and the roughly \$40,000 in medical expenses the plaintiff had incurred. The defense

also acknowledged the need for one to two years' of future psychological treatment.


The main dispute was whether the brain damage was "permanent" and determining what amount would reasonably compensate the plaintiff for his past and future general damages, such as his pain and suffering. It was due to this dispute that the case proceeded to trial, with the plaintiff seeking an amount in excess of \$1 million and the defense estimating general damages of \$100,000 to \$150,000.

During the case, it was evident that the plaintiff, a 32-year-old male, was a poor witness—he was bitter, argumentative, disrespectful and had negative facial expressions when he testified at deposition. This was a major factor in our defense evaluation of the case to the insurance company.

At trial, the plaintiff demonstrated the same unlikable personality to the jury, which may have objectively felt some sympathy toward him because of what happened, but he did not connect with them.

There was no dispute that he was beaten by the defendant's security guard and was seriously injured. However, in its verdict, the jury determined the plaintiff's general damages to be \$75,000 for past pain and suffering, and zero for the future. The verdict was at least partly a function of the plaintiff's demeanor when testifying. He was angry, hostile and testified without any sympathetic emotion—a major turnoff to the jury—which was reflected in its award. Had the plaintiff made a true connection with the jury, its award could have risen easily to \$500,000 to \$750,000.

In a second case, in which a plaintiff had been bitten on her chin by her friend's dog, the defendant's insurance company failed to recognize the impact that the plaintiff's likeable demeanor would have on a jury.

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The evidence showed that a portion of the plaintiff's chin, slightly larger than the size of a quarter, was bitten off cleanly by the dog. Her medical treatment consisted primarily of five cosmetic/reconstructive surgeries, and she incurred total medical expenses of approximately \$73,000.

Her general damages would be substantial, and her legal team felt she would be an excellent witness at trial. Her attorneys conservatively estimated that her general damages would be in the range of \$250,000 to \$500,000 for settlement purposes, recognizing that the verdict's value could be higher. The defense estimated general damages at approximately \$100,000 to \$175,000 and declined to settle, so the case went to trial.

The plaintiff, a 55-year-old female, was captivating before the jury. She testified in a manner that was thoughtful and sincere, and was able to place members of the jury in her position by making an emotional connection with them. While both attorneys made all the right arguments to the jury, the jury's award of the value for her general damages was \$650,000 for past pain and suffering, and \$10,000 for future.

Why Plaintiffs Win

The primary lesson learned from these two cases is that the plaintiff, as an individual, is frequently the key factor in determining what a jury will award in general damages. Also, as an interesting byproduct, it's apparent that in most cases in which there is a substantial injury, juries will award disproportionately more for past general damages than for future. Perhaps this is because the past is a certainty, whereas the future is an unknown.

Juries prefer to have definitive evidence when awarding damages, so it is also very important to assess the evidence that will demonstrate the trauma and emotional suffering that the plaintiff has endured to estimate the value of a plaintiff's "pain and suffering." Such evidence can be in the form of photographs, medical records or the testimony of the primary physician who treated the plaintiff. But perhaps more important is the plaintiff's ability to communicate, in a convincing and compelling manner, the details of their physical and mental pain when testifying.

In the first case above, plaintiff's attorney failed to recognize that his client was a poor witness. The case

went to trial as a result, and the plaintiff received an amount lower than what the defense had offered prior to trial. In the second case, the defendant's insurance carrier failed to recognize just how big an impact this plaintiff would have on a jury, and ended up paying more than triple the amount at which they had evaluated the case.

It is imperative that the insurance carrier knows and understands the uniqueness of the plaintiff in each case. The defense attorney has an obligation to properly quantify the effect of the intangibles and evaluate the impression the plaintiff is likely to make on a jury, so both the defendant and insurance company can assess their exposure and settlement value.

The defendant and its insurance company also have an obligation to ensure that the attorney they hire takes the necessary steps to make this assessment, and to communicate this information accurately in a timely manner. The attorney's primary and sometimes sole opportunity to undertake this assessment is during the plaintiff's deposition, especially in some of the more serious personal injury cases and cases with unusual injuries.

Recording the deposition on video, which can later be shown to colleagues, jury consultants and mock juries for their input, is often recommended. Videos also give the insurance carrier the opportunity to see the plaintiff, making the attorney's subject-assessment of the plaintiff more objective.

Ultimately, in order to accurately determine the value of a serious personal-injury case, the insurance carrier must evaluate those factors that are outside the normal profile. An endearing, persuasive and compelling plaintiff can multiply the value of the case.

The failure to factor in the intangible aspects of the plaintiff can end up costing the carrier thousands, or even hundreds of thousands, more in damage awards than anticipated. **BR**

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